

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

FILED
MAY 21 2012
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

DENO MILANO,

Plaintiff,

vs.

INTERSTATE BATTERY SYSTEM OF
AMERICA, INC.; INTERSTATE BATTERY
SYSTEM INTERNATIONAL, INC.

Defendants.

Case No.: 10-CV-2125-CW

**OBJECTION TO PROPOSED
SETTLEMENT, OBJECTION
TO ATTORNEYS' FEES REQUEST**

To The Honorable District Judge:

Comes Wayne Barginear ("Objector"), and files these Objections to the Proposed Settlement, Objection to Attorneys' Fees, and would show as follows:

1. Objector is a class member.

Objector declares that the following statements are true and correct:

(a) I am a member of the class and reside at 6934 Meadowlake, Dallas, Texas 75214.

(b) I purchased a covered battery from the Firestone Store located at 1720 Greenville Ave., Dallas, Texas in 2003 or 2004 and replaced it after it failed at the Firestone Store located at 6615 E. Northwest Hwy., Dallas, Texas in either 2005 or 2006.

I no longer have the receipt for any purchase. These locations sell Interstate Batteries.

(c) I have or will file a valid claim form.

(d) I object to the Settlement styled *In Re: Interstate Battery System of America, Inc., Interstate Battery System International, Inc.*

1 **2. Proposed Settlement Attempts to Place Unlawful Restrictions on Objectors**

2 The Proposed Settlement attempts to place unlawful requirements on objectors—
 3 contrary to Supreme Court authority. In *Devlin v. Scardelletti*, (2002) 536 U.S. 1, the
 4 Court held that objectors who appear at the fairness hearing have the right to appeal
 5 approval of a proposed settlement. The *Devlin* Court did not expand that requirement of
 6 appearing at the hearing to include other requirements such as making written objections
 7 by any certain date prior to the fairness hearing.
 8

9 Nonetheless, and contrary to *Devlin*, the Settling Parties' agreement (and the
 10 Notice they wrote) purports to require objectors to make full written objection long
 11 before the fairness hearing on pain of not being heard.
 12

13 This purported term in the Settling Parties' agreement is, it is submitted, unlawful.
 14

15 The Notice is misleading in claiming that objectors will not be heard if they do
 16 not file full written objections and a notice that they will appear long, long before the
 17 fairness hearing and provide additional information, in this case all cases where in
 18 objector has objected to a class action settlement within the last five years. This
 19 requirement is impermissible discovery by a different name.
 20

21 It is respectfully submitted that a settlement agreement containing unlawful terms
 22 and founded on a misleading notice to class members may not be properly approved.
 23

24 **3. Objection to Class Notice.**

25 The Federal Judicial Center, <http://www.fjc.gov/> has a specific section entitled
 26 "Judge's Class Action Notice and Claims Process Checklist and Plain Language Guide
 27 2010," which suggests a percent of class to be reached by notice at between 70-95%.
 28 This plan appears woefully deficient. Not mentioned in the long form notice is the

1 provision that individual notice is not possible because records of purchasers are not
2 available, according certification is sought under FRCP 23(b)(2). Items the Court should
3 consider include:
4

5 Is the notice plan conducive to reaching the demographics of the class?

6 Answer: Cannot tell because we don't know who is a member

7 Is the geographic coverage of the notice plan sufficient?

8 Answer: From the documents available to the class members we don't know
9

10 Is the coverage broad and fair? Does the plan account for mobility?

11 Answer: From the documents available to the class members we don't know

12 Is there an extra effort where the class is highly concentrated?

13 Answer: From the documents available to the class members we don't know
14

15 Does the plan include individual notice?

16 Answer: No, except 350 individuals

17 If names and addresses are reasonably identifiable, Rule 23(c)(2) requires
18 individual notice, according to documents filed only 350 class members will receive
19 actual notice.
20

21 The Federal Judicial Center cautions the Court to be careful to look closely at
22 assertions that mailings are not feasible.

23 Did the Court receive reliable information on whether and how much individual
24 notice can be given?

25 Answer: From the documents available to the class members we don't know
26

27 Will publication efforts combined with mailings reach a high percentage of the
28 class?

1 Answer: No

2 The lynchpin in an objective determination of the adequacy of a proposed notice
3 effort is whether all the notice efforts together will reach a high percentage of the class. It
4 is reasonable to reach between 70–95%. A study of recent published decisions showed
5 that the median reach calculation on approved notice plans was 87%. The net reach
6 calculation thorough, conservative, and not inflated? Will this standard be met?
7

8 Answer: No

9 The Notice plan is inadequate and the settlement should be rejected on notice
10 grounds alone.
11

12 **4. Objections to the Settlement.**

13 The settlement is not fair, reasonable or adequate and Objector objects to the
14 proposed settlement for the following reasons:
15

16 While it is possible to obtain a check card of \$8.50 if a class member is able to
17 submit a receipt, it is unlikely that more than a handful of class members will have
18 receipts for the purchase of interstate battery system of products for the period. Because
19 of the time period of this settlement, as a practical matter, battery purchasers will be
20 unlikely to have receipts because of the life of the batteries at issue. Because of the
21 difficulty in providing adequate proof of purchase, the result is a product voucher a/k/a a
22 coupon.
23

24 This Court should heed the Managing Class Litigation: A Pocket Guide for
25 Judges' admonition in "5 Appraisal of Settlement" that cautions:
26

27 "Your appraisal of the settlement should focus on the value actually
28 distributed to the class based on the number and percentage of class
members who have filed a claim. As discussed below in Section IV. C.4,
strict eligibility requirements and claims procedures often discourage class

1 claims and might reduce the total amount paid to class members, making
2 the stated value of the settlement fund illusory.”

3 The economic value to class members is unknown making a class member’s
4 evaluation of the settlement difficult.

5 **5. Objections to the Fee Petition.**

6 **Class Counsel’s Requested Attorney Fees are Unreasonable Because the**
7 **Value of the Settlement to the Class is Impermissibly Overstated**

9 In their Fee Petition, Class Counsel makes no value of the Settlement. This
10 dramatically calls in to question the actual value of the Settlement to the class members.

11 In reviewing a proposed settlement it is the role of the District Judge to protect the class’s
12 interests, acting as a fiduciary for the class. *In re Rite Aid Corp Securities Litigation*, 396
13 F.3d 294, 307 (3d Cir 2005). The actual value to the class warrants careful scrutiny and
14 additional information from the parties.
15

16 Experience has demonstrated that actual claim rates in coupon settlements is
17 miniscule, while the settlement creates a two tier claim system the reality is that little
18 money will be distributed to the class. The Court should require a total number of claims
19 filed at the Fairness Hearing. Because no notice is given to the class of the financial
20 value to the class, much less actual cost to the Defendant, it is impossible for class
21 members to fairly evaluate the settlement. Because this Settlement is nothing but a
22 system of reimbursement claims, it is fully analogous to a rebate coupon settlement. The
23 average redemption rate for coupons issued by corporations in marketing programs is
24 very low, approximately two percent; similarly, class action coupon redemption rates are
25 inherently infinitesimal. *Panel 3: Clear Notices, Claims Administration, and Market*
26 *Makers*, 18 Geo. J. Legal Ethics 1223, 1235 (2005).
27
28

1 Similarly, claims-made settlements in general see only very, very low redemption
2 rates. *Id.* at 1235. So whether one views this Settlement as a pure claims-made settlement
3 and coupon or as the parties call this a product voucher settlement The only way to
4 reliably calculate the actual value to the Settlement Class in this case is thus to base the
5 calculation on the number of actual, successful reimbursement claims.
6

7 Further, in practical effect this Settlement is a sales promotion for Defendant.
8

9 Reimbursement will lure already injured consumers back to the merchants who
10 have already sold them defective wares. In effect, the recovery plan awards the misfeasor
11 by luring the class back to buy more products. Because it is the nature of salespersons to
12 attempt to aggressively up sell customers — especially those that come in with coupons
13 or rebates — it is highly likely class members will find themselves pressured to spend
14 more money to buy products not related to the Settlement. If a service department
15 discovers something wrong with a vehicle brought in for under the Settlement — or
16 claims to find something wrong — the class member who brought in the vehicle could
17 easily find herself spending more money out of pocket.
18

19 Under the foregoing, the attorney fee petition in this Settlement is unreasonable
20 because the Settlement is not valued. The Settlement should not receive final approval
21 unless the value of the injunctive relief supports it.
22

23 The class members are receiving minimal economic benefits. The supposed
24 benefit to the class is in the form of an Agreed Injunction. In the Agreed Injunction
25 Defendant does no more than agree to follow current law and not misrepresent its
26 services.
27
28

1 The Court should consider in granting preliminary approval to a class settlement,
2 the requirement of consideration is lacking. When considering injunctive relief
3 settlements the court should review the settlement and consider the following:
4

5 (1) How much is the injunction worth to the class as a practical matter?

6 (2) What is the dollar value the relief might yield?

7 (3) What is the real cost to Defendant?

8 (4) Does the injunction do anything more than restate the obligation that
9 Defendant has under existing law.
10

11 (5) Is the class being asked to give up valuable economic damage claims?

12 Objectors would submit that the answers to the listed above are:

13 (1) Answer: Very little.

14 (2) Answer: Very little.

15 (3) Answer: Not much.

16 (4) Answer: No.

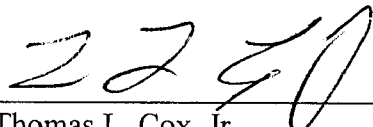
17 (5) Answer: Unknown because class members are not given a value.
18

19 **6. Joinder in Other Objections**
20

21 This Objector adopts and joins in all other well taken – bona fide objections filed
22 by other Class Members in this case, and incorporates them by reference as if they
23 appeared in full herein.

24 **7. Relief**

25 Wherefore, Objector prays that the Court deny the proposed settlement, deny
26 approval of the settlement class, deny the requested fees to Class Counsel and grant
27 Objector such other and further relief as to which Objector may be entitled.
28



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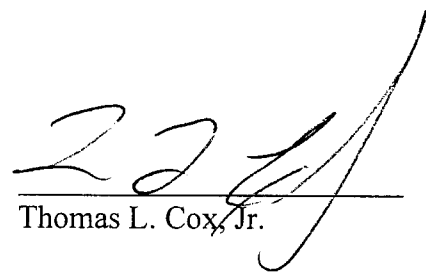
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been served according to the instructions in the notice on May 18, 2012, to the following:

Settlement Administrator
Milano v. Interstate Battery System of America
c/o GCG
P.O. Box 9782
Dublin, OH 43017-5682

With a copy to:

Clerk of Court
United States District Court
Northern District of California, Oakland Division
1301 Clay St
Oakland City Center
Oakland, CA 94612



Thomas L. Cox, Jr.